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IN THE

Supreme Court of the United States

October Term, 1958

No. 359

MIDWEST MOTOR EXPRESS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
Appendix	27
Opinion and Judgment Below	27

CITATIONS

	Page
Cases:	
Albright v. United States, 173 F. 2d 339 (8 Cir. 1949)	23
Benedict v. United States, 271 F. 714 (D.C. E.D. N.Y.)	22
Brooklyn Eastern District Terminal v. City of New York, 139 F. 2d 1007 (2 Cir. 1944)	14
Corn Products Refining Co. v. Commissioner, 350 U.S. 46, 76 S. Ct. 20 (1955)	10
Commissioner v. Golonsky, 16 T.C. 1450, aff'd 200 F. 2d 72 (2 Cir. 1953), cert. den. 345 U.S. 939, 73 S. Ct. 830	15
Commissioner v. Moore, 207 F. 2d 265 (9 Cir. 1953) cert. den. 347 U.S. 942, 74 S. Ct. 637	15
Emerson, Isaac v. Commissioner, 12 T.C. 875— (1949)	23
Fawn Lake Ranch Co. v. Commissioner, 12 T.C. 1139 (1949)	23

Franklin Flato v. Commissioner, 14 T.C. 1241 (1950) 23
Gillette Motor Transport, Inc. v. Commissioner, Docket No. 17,280 (1958) 25
Helvering v. William Flaccus Oak Leather Co., 313 U.S. 247, 61 S. Ct. 878 (1941) 23
Kimball Laundry Co. v. United States, 338 U.S. 1, 69 S. Ct. 1434 (1949) 13, 14
Magee, Glenn E. v. Commissioner, 17 T.C. 1583 (1952) 23
United States v. Benner, 186 F. 2d 407 (5 Cir. 1951) 23
United States v. Dow, —— U.S. ——, 78 S. Ct. 1039 (1958) 14, 25
United States v. General Motors Corporation, 323 U.S. 373, 65 S. Ct. 357 (1945) 13, 14
United States v. Miller, 317 U.S. 369, 63 S. Ct. 276 (1943) 14
United States v. Petty Motor Co., 327 U.S. 372, 66 S. Ct. 596 (1946) 13
United States v. Pewee Coal Co., 341 U.S. 114, 71 S. Ct. 670 (1951) 13, 14
United States v. United Mine Workers, 330 U.S. 258, 67 S. Ct. 677 (1947) 13, 14, 17
United States v. Westinghouse Electric and Manufacturing Co., 339 U.S. 261, 70 S. Ct. 644 (1950) 13, 14
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863 (1952) 11, 25

Statutes:

28 U.S.C. §1254(1) 2
46 U.S.C.A. §1242, Merchant Marine Act of 1936... 12
62 Stat. 1222; Act of July 2, 1948..... 6, 29
42 U.S.C. §2201 13
42 U.S.C. §1592(d) 13
50 U.S.C. §100(b) 13
50 U.S.C. §2281 13
33 U.S.C. §984 13
40 U.S.C. §41 13
Internal Revenue Code of 1939, Sec. 117(j), Sec. 112(f) 8, 9, 24
Internal Revenue Code of 1954, Sec. 7482(a), Sec. 1231 ..... 8, 9
Revenue Act of 1942 24

Miscellaneous:

Mertens, Law of Federal Income Taxation, §22, 124-125, Vol. 3B (1958)..... 20
H.R. No. 2333, 77 Cong. 1st Sess. 1942..... 22
Eleventh Annual Institute on Federal Taxation, New York University 23

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Petitioner, Midwest Motor Express, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on January 15, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is officially reported in 251 F. 2d 405. A copy of the said opinion may be found in the Appendix. The opinion of the Tax Court of the United States is officially reported in 27 T. C. 167. Since the opinion of the Tax Court appears in the record printed for the use of the Court of Appeals, nine (9) copies of which are filed herewith, the said opinion is not appended to this petition, but is omitted in accordance with Rule 23(1)(f) of the Rules of this Court.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on January 15, 1958 (R. 185). A timely petition for rehearing, filed on April 5, 1958, was denied on April 16, 1958 (R. 200). The time within which this Petition for writ of certiorari is to be filed in this Court has been extended from July 15, 1958 to and including September 13, 1958, by order of Mr. Justice Charles E. Whittaker, signed June 27, 1958. The jurisdiction of this Court is invoked under *28 U.S.C., § 1254(1).*

QUESTION PRESENTED

Whether an award received by petitioner as a result of the seizure in 1941 of all its properties by the United States of America pursuant to Presidential Executive Order is taxable in accordance with the provisions of *Section 117(j)* of the *Internal Revenue Code of 1939.*

STATUTE INVOLVED

The statute involved in this matter is *Section 117(j)* of the *Internal Revenue Code of 1939*, as amended.

STATEMENT OF THE CASE

Petitioner is a corporation organized under the laws of North Dakota with its principal office located at Bismarck, North Dakota. Since its inception in 1938, petitioner has been engaged in business as a common carrier of property by motor vehicle, operating its vehicles under the jurisdiction of the Interstate Commerce Commission in various midwestern states (R. 74-75).

Petitioner owned and operated motor tractors, trucks, semi-trailers, pick-up and delivery trucks and service cars. It also owned real estate, a terminal and miscellaneous personal property, all used in its business. All this property was acquired by petitioner prior to January 1, 1944 (R. 75).

From September 15, 1939, to August 11, 1944, petitioner and other motor carriers in the midwest were operating under substantially similar contracts with a drivers' union. In 1943 a group of midwestern carriers, including petitioner, sought to negotiate a separate contract with the union. Negotiations became deadlocked, however, and the matter was certified to the National War Labor Board, which decided that the wages should be increased. Because it could not afford the increase, petitioner continued to operate under the old contract until August 4, 1944, when the drivers went out on strike. On August 11, 1944, all petitioner's operations were shut down (R. 75).

In order to avoid hampering of the war effort and to keep the transportation systems in operation, the President of the

United States, on August 11, 1944, issued an order which directed the Director of the Office of Defense Transportation to take possession, assume control of, and operate certain listed motor carrier transportation systems for as long as necessary for the successful prosecution of the war. Petitioner was included in the list of carriers named in the order (R. 52-54, 75). The properties of more than one hundred carriers were so seized (R. 17). On the same date, August 11, 1944, the Director of the Office of Defense Transportation transmitted a telegram to petitioner which read in part:

> "By order of the President and on behalf of the United States, I have today issued an order taking possession and control, as of 12:01 A.M. on August 12, 1944, of your motor carrier transportation system and all property used or useful in the operation thereof * * *." (R. 54-55)

A formal "Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager," which incorporated the information contained in the above-mentioned telegram, was also sent to petitioner on the same date. Thus, as a result of the above executive orders, telegrams and notices, all petitioner's automobiles, trucks, rolling stock, personal property and equipment, real estate—its entire transportation system—including its intangible assets as well, i.e., its franchise to do business or its very existence—were seized by the Federal Government.

On August 12 and 13 a meeting was held between the midwest motor carrier operators, including petitioner, and representatives of the United States Government. The motor carriers were urged to resume their operations and to utilize their present personnel insofar as possible. They were advised that if they as former owners of the motor carrier

properties did not see fit to operate them, the Federal Manager would place his own representatives on the properties. The carriers agreed to resume operations subject to their right to file written protests and objections to the provisions of the Federal Manager's order (R. 76).

Within the time allowed for filing protests, petitioner filed with the Federal Manager a document in which it agreed to resume operations, but reserved its right to any compensation to which it might be entitled as a result of the taking of its transportation system and properties (R. 76).

The properties seized by the United States Government were held until September 28, 1945, at which time they were returned (R. 65, 77). Obviously only those parts of the rolling stock and equipment were returned to petitioner which were left after the more than one year of operation by the Government. Normal wear and tear would greatly affect the usable qualities of such equipment operated for that period of time, and thus, although its right to do business was restored, only depreciated tangible assets were returned.

During the period of August 12, 1944, to the date of termination of possession and control, the Federal Manager exercised full authority and control over the operations of petitioner's transportation system. He fixed the amount of wages to be paid employees, specifically ordering payment of the wage increase prescribed by the National War Labor Board on February 7, 1944 (R. 65), and he assumed control over all rates and the publication thereof, issuing an order to petitioner that no independent rate action should be taken without the prior written approval of the Federal Manager's office (R. 65). He also prescribed certain accounting methods and procedures which petitioner was required to follow,

and in general he regulated completely the operation of petitioner's motor carrier transportation system (R. 76-77).

Immediately after the properties which were seized from petitioner were released by the Federal Government, efforts previously commenced to obtain just compensation were continued. Conferences with representatives of the Office of Defense Transportation resulted in a denial of liability by that office. Subsequently, identical private relief bills were introduced in the Senate and House of Representatives to provide for settlement of claims for damages to the motor carriers' transportation systems, and to provide for just compensation for the seizure of those systems by the Federal Government (R. 77).

A Motor Carrier Claims Commission was established pursuant to the *Act of July 2, 1948*, c. 808, *62 Stat. 1222*, which provided that the Commission should hear and determine the claims and that its determinations were subject to review by this Court in the same manner as is provided for cases decided by the Court of Claims (R. 78-80).

On March 27, 1950, petitioner filed a claim with the Motor Carrier Claims Commission in which demand was made for the payment of just compensation for the taking, seizure, possession, use and operation of its properties and transportation system by the United States (R. 80).

On May 19, 1952, the Commission handed down its findings of fact, conclusions of law and memorandum relative to the claim of petitioner (R. 81). It found as an ultimate fact that on August 12, 1944, the petitioner's transportation system and all its property were taken for public use by the United States in such manner as to require the payment of just compensation to petitioner under the Fifth Amendment to the Constitution of the United States (R. 68).

The Commission determined that the United States was indebted to petitioner in the amount of $44,054.34 as just compensation for the seizure, possession and use of petitioner's properties during the period in question, and determined the amount of this award by a measure of the "market net rental value" of the said properties for this period (R. 85). In so doing it ruled:

> "In a case of taking for temporary use the normal measure of just compensation is the fair rental value of the property so taken and used. United States v. General Motors Corporation, supra [323 U. S. 373]; United States v. Petty Motor Co., 327 U. S. 372; Kimball Laundry Co. v. United States, 338 U. S. 1." (R. 83-84)

Having arrived at the amount of just compensation to petitioner for the seizure of its property, the Commission then determined that certain adjustments thereto were essential based upon the conclusion that:

> "During the Government's possession and control of petitioner's property, the operation of the business and system was the Government's own operation. The Government was therefore entitled to any profits derived therefrom, and should bear any losses sustained. In cases in which there was a loss, it was borne out of the petitioner's assets, and constituted a complete taking and consumption of such assets to the extent of the loss. In cases in which there was a profit, this profit was contained somewhere in the returned properties, and the returned properties were thus augmented by the amount of the profit. The result is that petitioner is to be awarded compensation in the amount of the loss in the one case, and the Government is to be credited with the amount of profit in the other." (R. 84)

In the instant case the Government earned a profit through its possession and operation of properties seized from petitioner amounting to $21,012.57 for which it was entitled to a credit. Thus, the Commission found that petitioner was entitled to a net award of $23,011.77, to which it added a sum equivalent to interest thereon at 4% per annum from September 28, 1945, to date of payment, which sum was found to be also a part of the just compensation (R. 85).

Petitioner received $29,324.74 from the United States during the year 1952, based upon the award determined by the Motor Carrier Claims Commission. It paid attorneys' fees in the amount of $5,384.77 in connection with its claim against the Government, and the net sum remaining thereafter, with minor adjustments, was subjected to tax as ordinary income in 1952, the year received (R. 86). Hence this litigation.

The Tax Court sustained the determination of the Commissioner that the amount received was accruable in 1952 and that petitioner was not entitled to the benefits of *Section 117(j)* of the *Internal Revenue Code of 1939* permitting capital gain treatment of amounts received from the involuntary conversion of property into money as the result of a seizure or requisition (R. 96-99).

The instant case was brought before the Tax Court under the provisions of *Section 6213* of the *Internal Revenue Code of 1954*, and jurisdiction of the Court of Appeals to review the decision of the Tax Court was invoked under *Section 7482(a)* of the *Internal Revenue Code of 1954*.

REASONS FOR GRANTING THE WRIT

The question presented involves the tax treatment to be afforded awards received as the result of government seizure of private property for an indefinite period.

The statute involved is *Section 117(j)* of the *Internal Revenue Code of 1939*.[1] Insofar as applicable, it provides as follows:

"Sec. 117. Capital Gains and Losses.

* * * * *

"(j) Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.—

"(1) Definition of property used in the trade or business.—For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or (C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a)(1)(C). * * *

"(2) General Rule.—If, during the taxable year the recognized gain upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure,

[1] The identical provisions are contained in the Internal Revenue Code of 1954, Section 1231

> or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets."

The question presented is novel and important. Heretofore it has not been resolved by any court decision. As the Court of Appeals for the Eighth Circuit in its opinion in this case stated:

> "There are no decisions other than the Tax Court in the instant case dealing directly with the question of whether federal control of a business or an industry during the war time constitutes a conversion of property within the meaning of Section 117(j) of the 1939 Code."

Section 117(j) has been interpreted by this Court in only one case. See *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 76 S. Ct. 20 (1955). The question there had no bearing on the problem here. Thus, the Eighth Circuit had no direct guidance from this Court in determining whether the taking of petitioner's transportation properties constituted a requisition and or seizure of property used in the petitioner's trade or business within the meaning of *117(j)*.

I

Important Issues Relating to Seizures of Private Property Heretofore Considered by This Court

Some of the problems arising in connection with governmental seizure and requisition of private property under emergency situations have confronted this Court on numerous occasions although no determination has ever been made of the tax consequences.

Certain aspects of the problem of seizures of private property were exhaustively considered by this Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952). There each member of this Court wrote an opinion in view of the importance of the seizure question involved. Since tax consequences result from every seizure, a determination of the tax aspects would seem to be of equal importance.

The several opinions of the Supreme Court in the *Youngstown Sheet* case, supra, characterized the action of the government there as a "seizure". In that case the President had directed the Secretary of Commerce to "take possession of and operate the plants and facilities" of certain steel companies where production was halted due to a labor dispute. The order provided that the "possession and operation of such plant, facility, or other property" of each company should be returned when further possession of that property was no longer necessary to the national defense. Appendix I of Mr. Justice Frankfurter's concurring opinion consists of a synoptic analysis of legislation authorizing seizure of industrial property from 1862 through the Defense Production Act of 1951. During that time there were eighteen sepa-

rate enactments. Appendix II of the same opinion contains a summary of seizures of industrial plants and facilities by the President from 1861 through 1952. One of the 84 seizures listed by Justice Frankfurter is the very same one that is the subject matter of this litigation—"Midwest Trucking Operators". Certainly in view of that authoritative analysis the properties of this taxpayer were taken as the result of "seizure"—identically the same word used in *Section 117(j)*.

Mr. Justice Douglas' concurring opinion in the *Youngstown* case distinguishes "seizures" as temporary takings from "nationalizations" which constitute a permanent taking. Each of the several opinions in the *Youngstown* case treat seizures as extraordinary emergency events.

The compilation by Mr. Justice Frankfurter is limited to seizures of entire businesses. It does not purport to include any of the requisitions or seizures of individual items of industrial equipment or productive property taken pursuant to acts authorizing the taking of individual items which also would give rise to similar tax consequences. An example is the Merchant Marine Act of 1936, which is still in effect (46 U.S.C.A. §1242), under which some 4,000 vessels were requisitioned by the government during the period of 1941-1943. Another such act which authorizes the requisitioning of individual items of productive property under certain circumstances is the Requisitioning Act of 1941. During the first year after the enactment of the Requisitioning Act of 1941, 269 requisitionings were accomplished pursuant to that statute. Furthermore, Mr. Justice Frankfurter's summary does not include many statutes now in effect which authorize the requisition, condemnation and seizure of the use of productive property for both permanent and temporary periods. The subject matters covered by these acts include such mat

ters as atomic energy,[2] defense housing,[3] nitrate plants used for national defense,[4] civil defense facilities,[5] the Saint Lawrence Seaway project,[6] and governmental office space.[7]

Because of the unprecedented volume of eminent domain cases during World War II which involved the taking of a temporary or indefinite use, this Court many times was called upon to determine the rights of the parties involved in such takings. In *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670 (1951), and *United States v. United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677 (1947), there was a "seizure". In *United States v. General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596 (1946); *United States v. Westinghouse Electric and Manufacturing Co.*, 339 U.S. 261, 70 S. Ct. 644 (1950); and in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434 (1949), the government had "condemned" short-term interests in property. All of these cases establish that the government must pay, as just compensation under the Fifth Amendment, the value of any property interest taken for the public use; and they further illustrate that the legal title to the physical thing which the government wishes to use need not be permanently taken in order to constitute a taking of property for which just compensation must be paid.

If the property interest taken is the right to permanent use, the government must pay the full and perfect value of that permanent use, which is ordinarily measured by the market

[2] 42 U.S.C. Section 2201 and sections referred to therein.
[3] 42 U.S.C. Section 1592(d).
[4] 50 U.S.C. Section 100(b)
[5] 50 U.S.C. Section 2281
[6] 33 U.S.C. Section 984
[7] 40 U.S.C. Section 11

value of the fee itself. E.g., *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943); *Brooklyn Eastern District Terminal v. City of New York*, 139 F. 2d 1007 (2 Cir., 1944). If the property interest taken is a right to temporary use, the government must pay the full and perfect value of that temporary right of use, which is the transferable value of that property interest (i.e., the fair market rental value for the temporary period). *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434 (1949); *United States v. General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357 (1945). The difference between these two situations simply amounts to an "alteration in the property interest taken"; and instead of representing the value of the right to use and occupation of the item for its entire remaining life (i.e., the full ownership), the compensation received represents the value of the right to the use and occupation of the item for a temporary period which is less than its entire remaining useful life. See *United States v. Dow*, —— U.S. ——, 78 S. Ct. 1039 (1958).

Likewise, in determining the right to compensation, it makes no difference whether the property interest was directly appropriated by executive action (i.e., seizure or requisition) or appropriated pursuant to a court order (i.e., condemnation). *United States v. Peirce Coal Co.*, 341 U.S. 114, 71 S. Ct. 670 (1951); Cf., *United States v. United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677 (1947). This Court has refused to permit the formalities chosen by the government in assuming the right to the use and possession of property under its power of eminent domain to affect the rights of the parties. See *United States v. Dow*, supra; *United States v. Westinghouse Electric and Manufacturing Co.*, 339 U.S. 261, 70 S. Ct. 644 (1950).

The holdings of all these cases are based upon the definition of the term "property" which was adopted by this Court in the *General Motors* case. In that case, at 323 U.S. 378, 379, this Court made it clear that there is a "taking" of "property" whenever a person is deprived of any property right or interest of any kind whatsoever, *such as the right to use and possess and dispose of a physical thing either permanently or for a temporary period*, as a result of the exercise of the power of eminent domain; that the ordinary legal meaning of the term "property" is not limited to things as such, but more accurately means a group of rights inhering in a person's relation to a thing; and that "property", as used in the Fifth Amendment, is addressed to every sort of interest that a person may possess whether title is taken or not. Thus, where the use and possession of a thing is taken for any length of time, a property right has been taken. This is a sensible result since the right to the use and possession of property is the most valuable incident of ownership from a practical standpoint.

This ordinary legal meaning of the term property, as defined by the *General Motors* case, has been adopted as the meaning of property in tax cases as well. E.g., *Commissioner v. Golonsky*, 16 T.C. 1450, aff'd 200 F. 2d 72 (2 Cir., 1953), cert. den. 345 U.S. 939, 73 S. Ct. 830; *Commissioner v. Moore*, 207 F. 2d 265 (9 Cir., 1953), cert den. 347 U.S. 942, 74 S. Ct. 637.

The Commissioner here, however, has successfully urged before both the Tax Court and the Court of Appeals that even though petitioner's property rights were taken, the money received by petitioner did not represent compensation for the property interest taken from petitioner, but rather represented compensation for the loss of profits or loss of

income which petitioner would actually have received from the use of its property had there been no taking.

This line of reasoning again is in conflict with the determinations of this Court made in the numerous seizure cases that compensation granted to one whose property is taken as the result of the exercise of the power of eminent domain necessarily represents the value of the property taken; and that such an award represents the full and perfect value of the property taken which in practice means the market value of that property right. Loss of anticipated profits and anticipated income which would actually or probably have been received by the owner by using the property himself had it not been taken, cannot, as such, even be an element in the award. Furthermore, anticipated profits and anticipated income are relevant (if at all) only as evidence which may be used in formulating a judgment as to the market value of the property right taken. The rule is the same whether the entire remaining life of the physical property held by the transferor is taken or whether property is taken for an indefinite period, as here.

II

Law Relating to Tax Consequences of Seizure of Private Property in Need of Clarification

It would seem important in view of the extremely large number of statutes authorizing seizure or requisitions of untold classifications of private property that this Court establish some guiding principles. This case is a classic example of the confusion that exists in tax cases as a result of such seizures.

For example, the government argued before the Motor Carrier Claims Commission that the Federal Manager's action here "did not amount to a taking of its property but merely to regulation" (R. 37). The Court of Appeals for the Eighth Circuit, in its opinion in this case, relied upon the same expressed philosophy. In so doing, that Court relied upon Operations Order No. 1, issued by the Federal Manager. In its opinion it stated that the possession of the United States was not exclusive and as authority for that view quoted from the Operations Order to the effect that "* * * the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order." In no sense of the word did the Operations Order, upon which that Court bottomed its opinion, purport to be the authority under which petitioner's properties were seized. The seizure order was one issued by the President of the United States (R. 17).

Exactly the same situation existed when the United States seized the coal mines during World War II. In the case of *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S. Ct. 677 (1947), the Union and John L. Lewis were ordered to cease and desist from interfering with the operations of the mines by the United States of America. Their defense was that the United States had not taken complete ownership of the mines, but rather only regulation thereof. This was the very same theory upon which the Eighth Circuit in part based its decision in this case. This Court rejected such a view in the *United Mine Workers* case, saying (330 U.S., p. 288):

> "The defendants, however, point to the fact that the private managers of the mines have been retained by

the Government in the role of operating managers with substantially the same functions and authority. It is true that the regulations for the operations of the mines issued by the Coal Mines Administrator provide for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private manager, has nevertheless retained ultimate control.

"The defendants also point to the regulations which provide that none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit. The regulations on which defendants rely represent an attempt on the part of the Coal Mines Administrator to define the respective powers and obligations of the Government and private operators during the period of Government control. We do not at this time express any opinion as to the validity of these regulations. It is sufficient to state that, in any event, the matters to which they refer have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers."

Mr. Justice Black stated with reference to that case at 330 U.S., p. 329:

"The fact that it utilized the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves."

In the same opinion, this Court outlined the relationship between the seized property, the employees and the United States Government as follows (330 U.S. 284):

> "Section 3 of the War Labor Disputes Act calls for the seizure of any plant, mine, or facility when the President finds that the operation thereof is threatened by strike or other labor disturbance and that an interruption in production will unduly impede the war effort. Congress intended that by virtue of Government seizure, a mine should become, for purposes of production and operation, a Government facility in as complete a sense as if the Government held full title and ownership. Consistent with that view, criminal penalties were provided for interference with the operation of such facilities."

In its opinion in this case, the Court of Appeals, seemingly contrary to the views above expressed, defined the relationship existing between the petitioner and the United States Government as follows:

> "What it amounted to was forcing the petitioner to continue operation of its transportation system."

Adding to the confusion, the foregoing statement appears to be in direct conflict with the determination of the Motor Carrier Claims Commission for in support of its judgment in making this award it made the following assertions (R.37):

> "To say that the acts done by the Government and its representatives amounted merely to regulation would be to belie the statements contained in the Executive Order and the orders issued thereunder. The Federal Manager could not alter the intention expressed by the President, and could not lessen the effect of the President's Order and the act of the Director of the Office

of Defense Transportation in taking possession and control under the Order."

The Court of Appeals here, although conceding that there was a "taking" of some thing but not property, within the meaning of the Fifth Amendment, thought nevertheless that the award did not qualify for 117(j) treatment as that section contemplates capital gains and losses, including gains and losses from the involuntary conversion of capital assets by the sales or exchange thereof, or in effect, transfer of title. Such an approach completely nullified Section 117(j) for all practical purposes and disregards the cases heretofore cited in which this Court has determined that a seizure such as this constitutes the taking of property.

Section 117(j) is not merely a clarification of a pre-existing capital gain statute, but is a twofold extension of more liberal tax treatment to situations which, before the enactment of *117(j)* in 1942, would have been productive of ordinary income for tax purposes. See *Mertens, Law of Federal Income Taxation*, §22, 124-125, Vol. 3B (1958 ed.). Whereas previously the kind of property disposed of had to be a "capital asset" to merit capital gain treatment, *117(j)* includes "property" used in a trade or business."[3] Also, whereas previously the kind of disposition or conversion had to be a "sale or exchange," *Section 117(j)* enumerates certain compulsory dispositions or conversions, including requisition and seizure. Hence, transactions which do not involve either a "capital asset" or a "sale or exchange" may qualify for capital gain treatment under *Section 117(j)(2)*.

Relevant policy considerations support the adoption of

[3] It has been stipulated that the properties here seized were used in petitioner's trade or business and were held for more than six months (R. 19).

the ordinary meaning of requisition and seizure as already defined. There are several practical tax policy considerations which made it wise and desirable that Congress grant capital gain treatment to owners of business and other productive properties who have suffered the hardship of having the use and possession of their property forcibly taken for a temporary or an indefinite wartime period. It is easy, with the benefit of hindsight, to overlook the crisis in which a business is placed on such an occasion. A lessee who has part of the remaining life of his leasehold taken from him is placed in a difficult financial position. The same is true of a fee owner who has a portion of the remaining useful life of his fee taken. He may not know when the items taken will be returned or what compensation he will receive, but he still must make business judgments with respect to his remainder interest. The suddenness of such takings may produce considerable inconvenience and expense to the land owner or business owner. Also, owners are likely to suffer heavy consequential losses where key items or property interests necessary to the operation of a business are requisitioned temporarily or indefinitely. It may be impossible to continue in that business without the right to use key items. The fact that only part of the remaining life of a property interest is taken serves to aggravate rather than mitigate the damage done. Furthermore, the delay in determining whether any payment will be made at all, the delay in determining the amount of any such payment, and the further delay in receiving actual payment of compensation for impromptu takings will impose a considerable burden upon the owner. Another justification for this preferential treatment is the fact that the government may need the property of only a few businesses while other competing businesses are not

interrupted. Those latter business would then be in a position to strengthen themselves at the expenses of the businesses whose property was temporarily requisitioned. That was to some extent the situation in the instant case. All these considerations were given serious thought during and after the wartime requisitioning and condemnation was taking place. By enacting *117(j)* in 1941 Congress recognized that those who suffered the hardship of having property interests used in their businesses taken involuntarily to meet wartime needs should receive preferential tax treatment.

In *Benedict v. United States*, 271 F. 714 (D.C. E.D. N.Y., 1920), the Court pointed out that a requisition is not a taking under agreement and the acquiesence on the part of a citizen to the taking of his property by the sovereign is not the equivalent of the making of a contract because it is a "one-sided exercise of authority." The fact that it is a "one-sided exercise of authority" makes it reasonable to tax the proceeds resulting from a requisitioning for a temporary or indefinite use by the government at more favorable rates than the rental from a lease voluntarily entered.

The position of the Commissioner in this case is consistent with his restricted interpretation of *117(j)* ever since it was enacted. For example, in the livestock cases, he has constantly sought to thwart the intention of Congress to afford farmers the same capital gain benefits upon the sale of productive livestock as is given a manufacturer when he sells a productive machine used in his trade or busines. Section *117(j)* was a relief provision that is supposed to be given a liberal interpretation. Congress (H.R. No. 2333, 77 Cong. 1st Sess. 1942; C.B. 1942-2, 415) has so stated. Yet the Commissioner of Internal Revenue has thrown every road block possible in the way of the taxpayer obtaining the benefits

Congress intended. As pointed out by the very excellent article on this subject in *Eleventh Annual Institute on Federal Taxation*, New York University, p. 45:[9]

> "The history of applicability of Section 117(j) to livestock has been one of administrative resistance by the Bureau, followed by judicial interpretation favorable to the taxpayer and disapproving of Bureau imposed limitations, still later followed by statutory amendment gengenerally consolidating the favorable case-law."

The theory of the Commissioner for denying that there was an "involuntary conversion" in the instant case has its origin in cases which hinged upon whether there was a conversion by "sale or exchange." Before the enactment of Section 117(j) a sale or exchange was a requirement in order to have money received from an involuntary conversion afforded capital gain treatment. Thus in *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 61 S. Ct. 878 (1941), this Court held that "destruction" by fire, one of the involuntary conversions now enumerated in capital gain provisions of *117(j)*, was not a sale or exchange of property, and that therefore the indemnification received as the result of the destruction was not entitled to receive capital gain treatment as gains from the sale of capital assets. This Court stated that:

> "Generally speaking, the language in the Revenue Act, just as in any statue, is to be given *its ordinary mean-*

[9] A few of the cases in which the Commissioner of Internal Revenue has been upset in his efforts to frustrate Congressional policy in respect to 117(j) are: *Albright v. United States*, 173 F. 2d 339 (8th Cir. 1949) (cattle and hogs); *Fawn Lake Ranch Co.*, 12 T.C. 1139 (1949) (beef cattle); *Isaac Emerson*, 12 T.C. 875 (1949) (dairy cattle and hogs); *Glenn E. Magee*, 17 T.C. 1583 (1952) (turkeys); *United States v. Bennet*, 186 F. 2d 407 (5th Cir. 1951) (cattle); *Franklin Flato*, 14 T.C. 1241 (1950) (breeding herd of beef cattle raiser).

> *ing*, and the words 'sale' and 'exchange' are not to be read any differently." (Emphasis supplied.)
>
> "The fact that §112(f), 26 U.S.C.A., Int. Rev. Acts, page 695, characterizes destruction of property and indemnification for its loss as an involuntary conversion does not establish that the two events constituted a sale or exchange.'
>
> * * * * *
>
> "We can find nothing in this language or in other sections of the Act which indicates, either expressly or by implication, that Congress intended to classify as '*sales or exchanges*' the involuntary conversions enumerated in §112(f)." (Emphasis supplied.)

This Court reasoned that destruction did not come within the ordinary meaning of "sale or exchange." Less than a year after the *Flaccus Oak* case was decided, Congress expressly granted capital gain treatment to the conversions enumerated in *112(f)* by enacting *117(j)* as part of the *Revenue Act of 1942.* Destruction was one of the conversions enumerated therein. Requisition and seizure are also enumerated. At that time the nation was at war. The possibility that wartime conditions would result in destruction or seizure of business properties was present. Congress was in the course of authorizing the government to acquire the use and possession of whatever property interests, both realty and personalty, as might be needed for wartime purposes through the exercise of the powers of requisition, seizure and condemnation. Congress clearly knew that requisition and seizure ordinarily involved the use of productive property for temporary or indefinite periods.

As there has been no authoritative interpretation of this statute since its adoption, and in view of the fact Congress

enacted it soon after the *Flaccus Oak* decision, and at a time seizures of private property were expected to be a common occurrence, it is submitted that the writ should issue. Attention is called to the fact that a case involving identically the same issue is now pending for decision before the Court of Appeals for the Fifth Circuit. That case is *Gillette Motor Transport, Inc. v. Commissioner of Internal Revenue*, Docket No. 17,280.

The lower court decision in the instant case appears to be in direct conflict with several decisions of this Court dealing with the nature of the consequences flowing from eminent domain acquisition of property. In addition, it is important to note that the impact of this decision is much broader in scope than that of merely determining the rights of this individual petitioner and some one hundred other motor carriers, similarly circumstanced, for many other taxpayers may too find themselves confronted with this same problem. See for example the extensive numbers of seizures of private property listed in Appendix II of Mr. Justice Frankfurter's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952).

As was stated by this Court in the recent case of *United States v. Dow*, ——— U.S. ———, 78 S. Ct. 1039 (1958), a case decided after the Court of Appeals decided this one, "Because the question presented bears importantly on the rights resulting from federal condemnation proceedings, * * *."

certiorari also should be granted here to review the decision rendered in the instant case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 15,793

MIDWEST MOTOR EXPRESS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION TO REVIEW DECISION OF THE TAX COURT OF THE UNITED STATES

(January 15, 1958)

Joseph A. Mann (William R. Busch, and Bundlie, Kelley and Mann who were with him on the brief for Petitioner.

Morton K. Rothschild, Attorney, Department of Justice (John N. Stull, Acting Assistant Attorney General, and Lee A. Jackson and Melva M. Graney, Attorneys, Department of Justice, were with him on the brief) for Respondent.

Robert G. May, Brent O. Stordahl, Nils A. Boe and Hoyt Crooks filed brief as Amicus Curiae.

Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

VOGEL, Circuit Judge.

Petitioner, a North Dakota corporation, is and, at all times pertinent hereto, was engaged in business as a Class I common carrier of property by motor vehicle in interstate commerce. Prior to August 11, 1944, and during the prosecution

of World War II, petitioner and approximately 100 other associated midwestern motor carriers were operating under substantially similar contracts with an over-the-road drivers union. An impasse in wage negotiations ultimately resulted in a determination by the National War Labor Board that wage rates should be increased. Petitioner and numerous other associated carriers concluded that they could not afford the increase and in August, 1944, their drivers went out on strike. In order to avoid hampering of the war effort and to keep the transportation systems in operation, the President by Executive Order on August 11, 1944, seized possession and control of the transportation systems and other properties used therewith and owned by the associated midwestern motor carriers, including those of petitioner herein. The seizure was through the Director of the Office of Defense Transportation. The Executive Order provided:

> "2. Subject to the applicable provisions of existing law, including the orders of the Office of Defense Transportation, issued pursuant to Executive Orders 8989, as amended, 9156 and 9294, the said transportation systems shall be managed and operated under the terms and conditions of employment in effect between the carriers and the collective bargaining agents at the time possession is taken under this order. During his operation of said transportation systems the Director shall observe the terms and conditions of the directive order of the National War Labor Board, dated February 7, 1944; provided, however, that in the case of each said transportation system the Director is authorized to pay the wage increases provided for by the said directive order of the National War Labor Board, which accrued prior to the taking of possession of said system under this order, only out of the net operating revenue of the said system."

The Executive Order further provided:

> "4. Possession, control, and operation * * * shall be terminated by the Director when he determines that such possession, control, and operation are not longer necessary for the successful prosecution of the war."

Operations Order No. 1 provided, among other things:

> "*Titles to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive, and the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order.*" (Emphasis supplied.)

Such possession and control of petitioner's transportation system and property were terminated on September 28, 1945. Efforts by the owners at obtaining just compensation for the assumption of possession and control by the government ultimately resulted in the Congress creating a Motor Carrier Claims Commission to hear and determine all claims. Act of Congress of July 2, 1948, (62 Stat. 1222). The Act establishing the commission provided in part:

> "Sec. 2. The Commission shall hear and determine, according to law, existing claims against the United States arising out of the taking by the United States of possession or control of any of the motor-carrier transportation systems * * *."
>
> * * * * *
>
> "Sec. 6. The Commission shall receive claims for a period of six months after the date of enactment of this Act, and not thereafter. The *jurisdiction of the Commission over claims presented to it* as provided in section 2 of this Act *shall be exclusive*; but nothing in this Act shall prevent any person who does not elect to present his claim to the Commission from pursuing any other remedy available to him." (Emphasis supplied.)

The Act also provided that the Commission's determination should be subject to review in the same manner as is provided for cases in the Court of Claims upon application to the Supreme Court within three months from the date of filing of such determination.

On March 27, 1950, the petitioner herein filed a claim with the Motor Carrier Claims Commission for $196,019.49. Petitioner computed such amount due on the basis of what it believed to be the rental value of its properties during the the period of government control. On May 19, 1952, the Commission made its determination that the United States was indebted to the taxpayer for $44,054.34, which amount was based on net rental value. During the period the petitioner's properties were under control of the government an operating profit of $21,012.57 was made and left with the business. The Commission found that the government was entitled to a credit of such amount, leaving a net of $23,041.77 plus "* * * a sum equivalent to interest at 4% per annum on the sum of $23,041.77 from September 28, 1945, to date of payment, said sum also being a part of just compensation." Such item was computed to be $6,282.97, so that petitioner received a total of $29,324.74 from the United States during the year 1952 based upon the Commission's award. In its income tax return for the calendar year 1952 the petitioner disclosed the facts surrounding the receipt of the award but did not include any part thereof as taxable income.

The Commissioner, in determining a deficiency, concluded that the entire amount of the award was taxable income in the year 1952. The Tax Court (27 T.C. 167) held with the Commissioner, deciding that the petitioner's right to receive the award and the amount of the award were not fixed with reasonable certainty at any time prior to 1952 and accord-

ingly the award was income during such year and, further, that the taxpayer was not entitled to treat the award as capital gain under Section 117(j) of the Internal Revenue Code of 1939, as amended, 26 U.S.C.A., because the award was not an involuntary conversion payment but ordinary income within the meaning of Section 22(a) of the 1939 Code, 26 U.S.C.A.

Petitioner asserts in this court:

"I. The Tax Court's decision that the sum of $29,324.74 received from the United States Government in 1952 by petitioner, an accrual basis taxpayer, as the result of an award made by the Motor Carrier Claims Commission, on account of the seizure of petitioner's motor carrier system in 1944, is reportable as income in the year 1952 is clearly erroneous and without support in the evidence.

II. The Tax Court's decision that petitioner was not entitled to treat said award, made by the United States Government on account of its seizure of taxpayer's business, as an amount received upon the involuntary conversion of property as a result of the exercise of the power of requisition or condemnation as provided in Section 117(j) of the Internal Revenue Code of 1939 is clearly erroneous and without support in the evidence.

A. The holding of the Motor Carrier Claims Commission that petitioner's property was taken for public use by the United States is res judicata for the purpose of determining the existence of an involuntary conversion of property under exercise of the power of condemnation within the meaning of Section 117(j).

B. In the event that this Court decides the res judicata rule does not apply, the statute requires a finding of an involuntary conversion of property under the exercise of the power of condemnation within the meaning of Section 117(j)

C. The facts here are such that all of the requirements of Section 117(j) are fulfilled."

We consider first the question of whether or not the Tax Court's determination that the award accrued in 1952 was correct. Petitioner here filed its income tax returns for calendar years and on an accrual basis. Section 41 of the Internal Revenue Code of 1939, 26 U.S.C.A., provides that the net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer. Section 42 provides that the amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer unless under methods of accounting permitted under Section 41 any such amounts are to be properly accounted for as of a different period. The petitioner here having filed its returns and kept its books on an accrual basis, the question is whether the award from the Motor Carrier Claims Commission accrued in 1952 as the Tax Court determined or in some earlier year, as contended by petitioner.

Petitioner's transportation system was operated under government control from August 11, 1944, to September 28, 1945. During that period a profit of $21,012.57 was realized. This was retained in the business and not taken by the government. Upon release of the petitioner from federal control, it made efforts to obtain additional compensation from the Office of Defense Transportation, which denied liability therefor. Subsequently, private relief bills were introduced in both houses of Congress. In 1948, on July 2, 62 Stat. 1222, an act establishing the Motor Carrier Claims Commission was passed. On March 27, 1950, the taxpayer filed with the Commission a claim in the amount of $196,019.49, which

claim was still pending at the time the award was made on May 19, 1952. It is of significance also that the petitioner did not accrue the amount of the award in its returns prior to 1952. In its 1952 return it for the first time disclosed the facts with reference to the award. The Tax Court found that the right to receive the award and the fixing of the amount thereof with reasonable certainty occurred in 1952. Findings of the Tax Court may not be set aside unless clearly erroneous. Rule 52(a) F.R.C.P.; *Card v. Commissioner of Internal Revenue*, 8 Cir., 1954, 216 F. 2d 93; *Commissioner of Internal Revenue v. Newman*, 8 Cir., 1957, 248 F. 2d 473.

The Supreme Court has stated, in *Security Flour Mills Co. v. Commissioner of Internal Revenue*, 1944, 321 U.S. 281, 286-287:

> "The rationale of the system is this: 'It is the essence of any system of taxation that it should produce revenue ascertainable and payable to the government at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation.'
>
> This legal principle has often been stated and applied. The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or *applying the accrual basis, the year in which the right to receive, or the obligation to pay has become final and definite in amount.*" (Emphasis supplied.)

Dixie Pine Products Co. v. Commissioner of Internal Revenue, 1944, 320 U.S. 516, 519:

> "It has long been held that in order truly to reflect the income of a given year all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted

> though not paid. And this cannot be the case where the liability is contingent and is contested by the taxpayer."

This court, in *Craig v. Thompson*, 8 Cir., 1949, 177 F. 2d 457, 460, stated:

> "It is equally true that a taxpayer on the accrual basis must accrue income in the year in which the amount of the income is reasonably determinable, and the same rule applies to deduction for expenses. *Continental Tie & Lumber Co. v. United States*, 286 U.S. 290, 52 S. Ct. 529, 76 L. Ed 1111; *Spring City Foundry Co. v. Commissioner*, 292 U.S. 182, 54 S. Ct. 644, 78 L. Ed 1200; *United States v. Anderson, supra.*"

Petitioner's theory is that in 1944 when the government seized possession and control of its property it had an immediate right to just compensation under the Fifth Amendment to the Constitution, citing *Wheelock Brothers, Inc. v. United States*, Ct. Cl., 1950, 88 F. Supp. 278. That was a case where one of the associated motor truck carriers brought action against the United States in the Court of Claims. That court held the trucker entitled to compensation within the meaning of the Fifth Amendment, measured the liability of the government for the temporary taking of property by its rental value, and allowed plaintiff judgment. The Supreme Court, in *United States v. Wheelock Brothers, Inc.*, 1951, 341 U.S. 319, vacated the judgment and ordered the case dismissed because Wheelock Brothers had filed a claim with the Commission and the Court of Claims, therefore, had no jurisdiction. Whatever force that case had was wiped out by the Supreme Court's order of dismissal.

In opposing the Tax Court's holding, the petitioner claims that the proper year for accruing the tax is 1951, when the Motor Carrier Claims Commission determined the *R.R.*

Freightlines Inc. case, the first of the motor carrier awards allowed, arguing that, "At that time, the method of computing damages had been clearly established; that is, 'net fair rental value' of the equipment, property and franchises seized and possessed by the United States of America."

In support of its contention, petitioner cites a case from this court, *Helvering v. St. Louis Southwestern Ry. Co.*, 8 Cir., 1933, 66 F. 2d 633, cert. denied 292 U.S. 626. That case involved the accrual of compensation in excess of the standard return for the government's use of a railroad during World War I. This court sustained a determination by the Board of Tax Appeals to the effect that compensation in excess of the standard return was accruable during 1918, 1919 and 1920, even though the amount was not settled and agreed upon until 1923. That case differs from the instant one in that there the Federal Control Act of March 21, 1918, C. 25, 40 Stat. 451, provided for the measure of compensation to the carriers and we do not consider it authority for petitioner's contention herein. Cf. *Kentucky & Indiana Terminal R. Co. v. Commissioner of Internal Revenue*, 6 Cir., 1931, 54 F. 2d 738.

Petitioner also cites *Continental Tie & Lumber Co. v. United States*, 1932, 286 U.S. 290, 52 S. Ct. 529. The Supreme Court held there that after the passage of the Transportation Act the right to an award was fixed and that the taxpayer's case presented problems no different from those confronting many business concerns which keep accounts on an accrual basis and have to estimate for the tax year the amount to be received on transactions undoubtedly allocable to such year. The case is authority for the proposition that where the taxpayer has in its own books and accounts data to which it could apply the calculations required by the

statute and ascertain the quantum of the award within reasonable limits, the award is accruable in the year when the right thereto was fixed. It held that the function of the Interstate Commerce Commission in ascertaining the amount was purely ministerial. That situation is not comparable to the one which confronts the court in the instant case.

The 1951 income tax return of the petitioner does not accrue the award. That, of course, is not determinative but it is indicative of the conclusion that the taxpayer thought the amount not ascertainable within reasonable limits at that time. In addition thereto, the petitioner had a claim filed with the Motor Carrier Claims Commission in the amount of $196,019.49 up to the time in 1952 when the Commission made the actual award. We cannot say that the Tax Court's determination that the right to receive the award did not become final and definite in amount until 1952 is clearly erroneous. The Tax Court must be sustained as to the first issue.

With reference to petitioner's second point to the effect that this was an involuntary conversion of property and therefore subject to the provisions of §117(j), I.R.C. of 1939, as amended, 26 U.S.C.A., petitioner first argues that the issue has been resolved in a prior proceeding. It contends that the Motor Carrier Claims Commission, in deciding the first case brought before it, determined that there was a seizure under the powers of eminent domain and that the amount paid was just compensation to which petitioner was entitled under the Fifth Amendment. Under the principles of res judicata, it says that the government cannot now relitigate that question, citing *Sunshine Anthracite Coal Co. v. Adkins*, 1940, 310 U.S. 381, 402:

> "The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal."

The issues before the Tax Court and the Motor Carrier Claims Commission were not the same. The issue before the Tax Court was whether there was a conversion of petitioner's property by the government within the meaning of §117(j), 26 U.S.C.A. The case before the Motor Carrier Claims Commission involved the right to compensation and the amount thereof. The Commission's function was to "hear and determine, according to law, existing claims against the United States arising out of the taking by the United States of possession or control of any of the motor carrier transportation systems described * * *." 62 Stat. 1222. The Commission did not decide and could not decide the question of whether or not the award was a conversion within the meaning of §117(j). We do not consider the decision of the Commission as *res judicata* in the instant case.

Petitioner next argues that in the event the *res judicata* rule is not applicable, that the statute requires a finding of involuntary conversion of property under the exercise of the power of condemnation within the meaning of §117(j).

There are no decisions other than that of the Tax Court in the instant case dealing directly with the question of whether federal control of a business or an industry during the war time constitutes a conversion of property within the meaning of §117(j) of the 1939 Code. The Tax Court in this case held, *Midwest Motor Express, Inc. v. C.I.R.*, 27 T.C. 167, 185:

> "For the purpose of this section, (117(j)), the 'involuntary conversion' of property is the conversion of such property into money or other property as a result of

destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof. Regs. 118, Sec. 39.117(j)-1(a)(2). Thus, cash compensation received from the United States for property which was damaged, destroyed or converted while in possession of the United States under a lease entered into by the taxpayer under the threat of condemnation is an involuntary conversion payment. Guy L. Waggoner, 15 T.C. 496. However, if property is taken for temporary use but the owner continues to possess title and all other incidents of ownership of the property, the amount recovered to compensate the owner is income rather than capital gain from an involuntary conversion. Cf. Nicholas W. Mathey, 19 T.C. 1099, aff'd. 177 F. 2d 259, certiorari denied 339 U.S. 943.

In the instant case petitioner's property was not destroyed, either wholly or in part. Furthermore, the United States did not convert any of petitioner's assets to money or other property nor did it acquire the ownership of petitioner's property by requisition or threat of condemnation. At all times during the period of Federal control petitioner retained title to its properties. It is clear that the 'taking' by the United States consisted of the control and operation of petitioner's transportation system for a temporary period, not a condemnation or conversion of petitioner's property."

Petitioner contends that there was here a taking within the meaning of the Fifth Amendment to the Constitution which provides "* * * nor shall private property be taken for public use without just compensation," and that:

"Section 117(j) provides capital gain treatment for the 'compulsory or involuntary conversion (as a result of) destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property * * *.' The

> plain meaning of this statute covers petitioner's cause for a 'taking' or 'seizure' or 'condemnation' within the meaning of the Fifth Amendment can have no meaning outside of the contemplation of Sec. 117(j)." * * *

But what did the government "take" or in lieu of what was the award made? It took limited possession and control of petitioner's transportation system and other properties used therewith, but it specifically left 'titles to the properties and other assets' in the owners thereof. Its order provided that possession was not exclusive and that "* * * the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order." What it amounted to was forcing the petitioner to continue operation of its transportation system.[4] There was no conversion of capital assets within the meaning of §117(j). What the government had was an enforced temporary use of petitioner's transportation system during the war emergency. That there was a "taking" within the meaning of the Fifth Amendment is conceded but that "taking" should not be allowed to obscure the characteristics of what was taken by the government or received in lieu thereof by petitioner. §117(j) contemplates *capital* gains and losses, including gains and losses from involuntary conversion of capital. Title to the property here never left petitioner. Petitioner continued to operate its property with its own officers and employees for the period of government control. The Motor Carrier Claims Commission properly held that in the case of taking for temporary use the measure of just compensation was the fair rental value of the property used and that the rental value represented the petitioner's only money loss. The

net payment to petitioner here is no more a return for property condemned or destroyed than was the $21,012.57 profits left with the business and credited against the gross award. The just compensation paid for enforced operation amounted to a payment for use, an enforced use, it is true; but a use nevertheless. Practical considerations prohibit calling this use or rental payment an involuntary conversion of capital assets. Petitioner's loss was measured properly by the fair rental value of the property during the time of government control. To allow that use payment, to be denominated capital gain in order to arrive at a lesser tax rate would, in our opinion, be completely contrary to Congressional intent in enacting §117(j). We think the Tax Court was correct and its decision is accordingly affirmed.

A True Copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15793—September Term, 1957

Wednesday, January 15, 1958

MIDWEST MOTOR EXPRESS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION TO REVIEW DECISION OF THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the petition to review the decision of The Tax Court of the United States entered December 10, 1956, determining that there is a deficiency in income tax of petitioner for the year 1952 in the amount of $17,315.19, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the said petition to review, in this cause be, and the same is hereby, dismissed.

January 15, 1958

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 13 1958
JAMES R. BROWNING, Clerk

No. 359

In the Supreme Court of the United States

OCTOBER TERM, 1958

MIDWEST MOTOR EXPRESS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	5
Argument	7
Conclusion	11

CITATIONS

Cases:

Gillette Motor Transport v. *Commissioner*, decided March 6, 1958	10
Kieselbach v. *Commissioner*, 317 U. S. 399	9
Kimball Laundry Co. v. *United States*, 338 U. S. 1	8
United States v. *General Motors Corp.*, 323 U. S. 373	8
United States v. *Petty Motor Co.*, 327 U. S. 372	8

Statutes:

Act of July 2, 1948, c. 808, 62 Stat. 1222	6
Internal Revenue Code of 1939:	
Sec. 22(a) (26 U.S.C. 1952 ed., Sec. 22(a))	2, 7
Sec. 42 (26 U.S.C. 1952 ed., Sec. 42)	5
Sec. 117(j) (26 U.S.C. 1952 ed., Sec. 117(j))	3, 7
Sec. 275 (26 U.S.C. 1952 ed. Sec. 275)	5
Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, Sec. 99	5, 10

Miscellaneous:

S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 114-115	9

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 359

MIDWEST MOTOR EXPRESS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 73-102)[1] is reported in 27 T.C. 167. The opinion of the Court of Appeals is reported in 251 F. 2d 405.

JURISDICTION

The judgment of the Court of Appeals (Pet. 41) was entered on January 15, 1958. A timely petition

[1] Record references are to the record filed in the Court of Appeals.

for rehearing was denied on April 16, 1958. (R. 200.) By order of Mr. Justice Whitaker, the time within which to file a petition for a writ of certiorari was extended to and including September 13, 1958. The petition for a writ of certiorari was filed on September 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the sum received by the taxpayer in 1952 as the result of an award by the Motor Carrier Claims Commission on account of federal control of the taxpayer's transportation system during World War II is gain from the compulsory or involuntary conversion of property within the meaning of Section 117 (j)(2) of the Internal Revenue Code of 1939, or ordinary income under Section 22(a).

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, secur-

ities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *.

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), held for more than six months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part,

theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) [As amended by Sec. 322(c)(3), Revenue Act of 1951, c. 521, 65 Stat. 452] In determining under this paragraph whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsection (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The facts, as found by the Tax Court (R. 74-91), relating to the issue raised in the present petition, may be summarized as follows: [2]

The taxpayer is a corporation engaged in business as a common carrier of property by motor vehicle in interstate commerce. (R. 74-75.) Its income tax returns were filed on an accrual basis. (R. 74.) In order to prevent a threatened interruption of motor carrier service as the result of a labor disturbance, the President, on August 11, 1944, issued Executive Order No. 9462, under which he took possession and control of certain motor carrier systems, including that of the taxpayer. (R. 52-54, 75.)

The Federal Manager of motor carrier transportation systems and properties (R. 75) assumed his duties on August 11, 1944, and issued an order which provided, *inter alia* (R. 76):

> 1. Until further order, you are hereby directed to resume or continue the operation of your motor carrier transportation system in the usual and ordinary manner and course of business, as a going enterprise, in your present corporate, part-

[2] There was another question passed upon by the Court of Appeals, namely, whether the award by the Motor Carrier Claims Commission accrued in 1952. The abandonment of that issue by the taxpayer may be due to the enactment on September 2, 1958, of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, Section 99 of which, notwithstanding the provisions of Sections 42 and 275 of the Internal Revenue Code of 1939, gives the taxpayer an election to accrue the award as taxable income during the period of federal control, but without payment of interest for any period prior to March 15, 1953.

> nership, individual, or trade name, as the case may be, and by means of the instrumentalities, agents, officers, and employees customarily employed by you, as fully as if possession and control had not been taken and assumed by the United States, subject, however, to the terms of said Executive Order and to all general and special orders, rules, regulations, and directions, which may be issued thereunder. Title to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive, and the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order.

The Federal Manager retained possession and control of the taxpayer's transportation system from August 12, 1944, until September 28, 1945. (R. 76-77). During that period the taxpayer's officers and employees operated the system under the supervision and control of the Federal Manager, and the taxpayer realized a profit of about $21,000 during the period of federal control. (R. 67, 76-77.) At the termination of federal control, the property was returned to the taxpayer. (R. 65.) After the failure of various efforts to obtain additional compensation by the taxpayer and other motor carriers whose property was placed under the control of the Government, Congress passed the Act of July 2, 1948, c. 808, 62 Stat. 1222, establishing the Motor Carrier Claims Commission, whose function it was to hear and determine existing claims against the United States arising out of the

taking of possession or control of certain motor carrier transportation systems. (R. 77-80.)

The taxpayer filed a claim for about $196,000 (R. 80), and in 1952 the Commission awarded the taxpayer about $23,000, plus interest in the amount of approximately $6,000. (R. 81-86.) The taxpayer having failed to report any of the award as income in 1952, the Commissioner asserted a deficiency on the ground that the sum of about $29,000, representing the award plus interest, represented ordinary income in 1952. (R. 85-86.) The taxpayer contested the deficiency in the Tax Court on the ground that the income represented by the award did not accrue in 1952, and, secondly, that the sum in question was taxable as capital gain. (R. 2.) The Tax Court decided that the award by the Motor Carrier Claims Commission did not accrue until 1952 when the Commission's decision was handed down (R. 92), and that the award was ordinary income under Section 22(a) of the Internal Revenue Code of 1939 because it was paid as a substitute for rent (R. 98). On appeal, the Court of Appeals for the Eighth Circuit affirmed the decision of the Tax Court (Pet. 27-40), holding that there was no conversion of capital assets within the meaning of Section 117(j) of the 1939 Code. (Pet. 39.)

ARGUMENT

The decision of the court below is correct. Section 117(j)(2) of the Internal Revenue Code of 1939, *supra*, pp. 3-4, provides in part, and in certain circumstances, that gains from the compulsory or involuntary conversion (as a result of destruction in whole

or in part, theft or seizure, or an exercise of the power of requisition or condemnation) of property used in the trade or business shall be treated as gains from the sale or exchange of capital assets. Both the Tax Court and the Court of Appeals held that the possession and control of the taxpayer's motor transportation system by the United States during World War II was not a conversion within the meaning of the statute because it was not a permanent taking, but merely a taking for a temporary use. That there is a valid distinction between a permanent taking and a taking for a temporary use is apparently conceded by the taxpayer (Pet. 13-14), and is shown by the difference between the respective measures of compensation in the two cases. In the former case the measure of compensation is the fair market value of the property, whereas in the latter it is the market rental value. See *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motor Co.*, 327 U.S. 372; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1. While the permanent taking of property by the Government is undoubtedly a conversion within the meaning of the statute, the taking for a temporary use does not fall within the language of the statute because the property is returned to the private owner after the emergency. The facts of the present case clearly establish that the taking was for a temporary use.

Executive Order No. 9462, dated August 11, 1944, authorizing the Director of the Office of Defense Transportation to take possession and control of certain motor carrier transportation systems, including that of the taxpayer, was issued during World

War II to prevent the threatened interruption of that service as the result of a labor disturbance. (R. 52-54, 75.) The taxpayer and the other carriers were directed on the same day, August 11, 1944, to resume operations in the usual manner, with the help of their officers and employees; title to the properties was to remain in the owners; and the United States was to assert only such control over the properties as might be necessary to accomplish the purpose of operation. (R. 76.) On September 28, 1945, the control of the United States over the taxpayer's transportation system was terminated, at which time the possession and control of its properties by the Government was relinquished. (R. 65.) During the period of federal control, the taxpayer's system earned a profit of about $21,000, which it was permitted to retain. (R. 67.) The Motor Carrier Claims Commission determined in 1952 that the taxpayer was entitled to an additional sum of $29,000 [3] as compensation for the use of its property during the period of federal control. (R. 34, 68, 81-86.) Under these circumstances, both the Tax Court and the Court of Appeals determined that the taxpayer's property was taken merely for temporary use.[4] Therefore, there

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[3] Of this sum, about $6,000 (the difference between $29,324.74 and $23,041.77 (R.85)) represents interest, which is taxable as ordinary income regardless of whether or not there was a conversion of the taxpayer's property. See *Kieselbach* v. *Commissioner*, 317 U. S. 399.

[4] See S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 114-115, on the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, which states that claims for compensation made by motor carriers after World War II were settled on the basis of rental value.

was no conversion within the meaning of Section 117 (j) (2) of the 1939 Code.

There is no direct conflict of decisions. The only other case involving similar facts is in accord with the decision of the court below. *Gillette Motor Transport* v. *Commissioner*, decided March 6, 1958 (1958 P-H T.C. Memorandum Decisions, par. 58,022). The *Gillette* case is now pending on appeal to the United State Court of Appeals for the Fifth Circuit.

It may be pointed out that if the taxpayer, pursuant to Section 99 of the Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606, enacted on September 2, 1958, exercises an election to include the award of the Motor Carrier Claims Commission as income during the period of federal control (August 11, 1944, to September 28, 1945), the question presented in this petition will become moot. This case involves the taxable year 1952. If the taxpayer exercises this recently authorized election, the amount of the award will not be treated as income for 1952 and the question whether it would otherwise have been taxable in that year as capital gain or as ordinary income will be purely academic. The failure of the taxpayer to ask this Court to review that part of the decision of the court below which held that the amount of the award accrued as income in 1952 gives rise to the inference that the taxpayer expects to exercise the election provided by the statute to treat the award as income in 1944 and 1945.

CONCLUSION

The decision of the court below is correct, there is no conflict, and no question of general importance is presented. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1958

No. 359

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Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government has suggested in its brief in opposition to the petition for certiorari in this proceeding that the election now afforded the petitioner by Section 99 of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, enacted on September 2, 1958, would render the question presented by this certiorari petition moot if the petitioner should exercise

the election. The government further suggests that petitioner's intent to exercise the election afforded it under Section 99 of the Technical Amendments Act of 1958 is to be inferred from the fact that petitioner did not petition this court for certiorari as to the decision below with respect to the accruability of the government claim award in the taxable year 1952. Neither of these suggestions is well founded.

While Section 99 of the Technical Amendments Act of 1958 does grant to each recipient of an award from the Motor Carrier Claims Commission as a result of the government seizure of its property during the period from August 1, 1944 to September 28, 1945 the right to accrue that award as income in 1944 and 1945, instead of in 1952 as determined by the court below, Section 99 does not determine whether such income is to be taxed as a capital gain under the provisions of Section 117(j) of the Internal Revenue Code of 1939, or, on the other hand, as ordinary income under the 1939 Code. It is precisely this question that the instant petition for certiorari asks this Court to review and determine. As a consequence, even if the election under Section 99 were to be exercised by this petitioner, the question here presented would continue to have the same vital significance as it had prior to the enactment of Section 99 because of the different tax treatment accorded capital gains as distinguished from ordinary income. In no sense, therefore, can the enactment of Section 99 of the Technical Amendments Act of 1958 be regarded as rendering moot the question here raised for review.

Neither petitioner, nor any other carrier who received a similar award, is in any position to make an intelligent decision as to whether or not the election accorded by Section 99 should be exercised until the question of whether or

not the award is to be taxed as capital gain under Section 117(j) of the 1939 Code or as ordinary income under that Code is ultimately and finally decided. The need for a prompt and authoritative decision of the issue by this court becomes apparent when it is noted that Section 99 specifically provides that the carrier must make its election within one year from the enactment of Section 99 and when exercised the election is irrevocable.

Moreover, unless the decision of the court below is reviewed and reversed at this time it would, under the collateral estoppel principle applied in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S. Ct. 715 (1948), present to the government a defense to petitioner's treatment of the award as capital gain in 1944 and 1945, under Section 99 of the Technical Amendments Act.

CONCLUSION

For the reasons stated in the petition and in this brief the petition for certiorari should be granted.

Respectfully submitted,

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